No. 13,310

IN THE

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

GEORGE W. REED, and INTERNATIONAL HOD CARRIERS, BUILDING & COMMON LABORERS UNION, LOCAL NO. 36, A.F.L.,
Respondents.

On Petition for Enforcement of an Order of the National Labor Relations Board.

BRIEF FOR RESPONDENT GEORGE W. REED.

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On Petition for Enforcement of an Order of the National Labor Relations Board.

BRIEF FOR RESPONDENT GEORGE W. REED.

I. SUPPLEMENTAL STATEMENT OF THE CASE.

This case involves the action of a local Business Agent of the Hod Carriers Union who threatened to order all of the members of his Union to cease working with another member of the Union until the latter complied with a Union rule requiring that he have a "clearance" from the Union for the particular job on which he was employed (R. 125-128, 135-136, 183-184). The president of the Union testified that the rule requiring a clearance was for the protection of

Union members against irresponsible contractors (R. 135-136), and that the charging party in this case could have had a clearance for the asking (R. 138), since there was no question as to respondent George W. Reed's financial responsibility (R. 139).

Faced with the loss of his entire crew of five hod carriers because of the Business Agent's threats, respondent Reed laid the charging party off until such time as he straightened out his difficulty with his Union (R. 78, 159). The charging party never sought a clearance from his Union, although a week after his layoff he sought and obtained the Business Agent's signature to a form needed in connection with his claim for unemployment compensation insurance (R. 124, 190). At that time he was offered a clearance to work on respondent Reed's job, but rejected the offer (R. 125, 138).

The charging party has been a member of the Hod Carriers Union continuously since 1906, with but one brief interruption (R. 173). Following his difficulty with the Union on respondent's job, he tendered his Union dues (R. 173) and his membership in the Union has continued uninterrupted (R. 182), without resignation (R. 174) or expulsion (R. 173, 182).

The charging party was a temporary employee of respondent Reed, having been hired during a lull in the operations of his regular employer, Harry E. Drake, and upon the understanding that he would return to Mr. Drake's employment when the latter's operations picked up (R. 157, 160, 168). Mr. Drake's operations did pick up on June 24, 1949, ten days after

the charging party was laid off by respondent Reed, and Mr. Drake recalled two other men whom he had sent to respondent Reed along with the charging party (R. 169). Mr. Drake had work for hod carriers at that time, and he would have employed the charging party if the latter had applied for work (R. 169-170).

At the time the charging party was laid off the crew with which he was working was engaged in the building of flower boxes in front of apartment houses at Stonestown in San Francisco (R. 84). All of the material used by respondent Reed on this project came from sources within the State of California (R. 99-100). Respondent Reed had no labor disputes or difficulties on any of his other projects during 1949 (R. 105).

II. SUMMARY OF ARGUMENT.

Respondent Reed contends that this Court should set aside the Board's order as to him for the following reasons:

A. Even if it were to be assumed that respondent Reed's conduct constituted an unfair labor practice within the meaning of Section 8 (a) of the National Labor Relations Act, such conduct was not an "unfair labor practice affecting commerce" within the meaning of Section 10 (a) of the Act. At the time the Business Agent of the Hod Carriers Union threatened to order the members of his Union not to work with the charging party, respondent's crew of hod carriers

and bricklayers was engaged in the construction of flower boxes for apartment houses. An interruption of this work could not possibly have had a direct effect upon the movement of materials in interstate commerce, since respondent Reed used no materials from out-of-state sources on the project. There was no evidence whatever that a delay in the installation of flower boxes, or of the chimneys and garages which were also a part of respondent's subcontract, would have interrupted any other construction work on the project or the inflow of any of the out-of-state material which went into such other work. The labor difficulty in question, namely, the refusal of members of the Hod Carriers Union to work with another member who had not complied with a Union rule, did not in any way involve or affect respondent's operations on other projects, and hence a consideration of the impact of such other operations upon interstate commerce is not material to a determination as to whether this particular alleged unfair labor practice "affected [interstate] commerce".

B. Respondent Reed's conduct was not an unfair labor practice within the meaning of Sections 8 (a) (1) and 8 (a) (3) of the Act, since such conduct did not have the proximate and predictable effect of encouraging or discouraging membership in the Hod Carriers Union. The charging party was a member of the Hod Carriers Union, and had been a member of that Union for many years. After his layoff by respondent, he took active steps to maintain his Union membership by the tender of dues, and such member-

ship did in fact continue. No other hod carrier who had knowledge of respondent's conduct was either encouraged in or discouraged from Union membership, since uncontradicted evidence established that all of them were members of the Union.

C. The order is arbitrary, capricious and contrary to law for the reason that it was issued at a time when employers (such as respondent Reed) and unions in the building and construction industry were being effectively denied the benefit of the election provisions of the National Labor Relations Act. The enforcement of the unfair labor practice provisions of the Act in such circumstances is contrary to the intent of Congress, and a denial of due process of law in contravention of the Fifth Amendment to the Constitution of the United States.

Respondent Reed contends, further, that in the event enforcement of the Board's order is directed, his liability for back pay should be limited to the loss of pay attributable to his conduct; namely, such loss of pay as the charging party may have suffered during the period from June 14, 1949, the date of the layoff, to June 24, 1949, the date on which the charging party, in the normal course of events, would have returned to the employ of his regular employer.

III. ARGUMENT.

A. EVEN IF IT WERE TO BE ASSUMED THAT RESPONDENT REED'S CONDUCT CONSTITUTED AN UNFAIR LABOR PRACTICE WITHIN THE MEANING OF SECTION 8 (a) OF THE NATIONAL LABOR RELATIONS ACT, SUCH CONDUCT WAS NOT AN "UNFAIR LABOR PRACTICE AFFECTING COMMERCE" WITHIN THE MEANING OF SECTION 10 (a) OF THE ACT.

Under Section 10 (a) of the National Labor Relations Act, the authority of the Board to prevent any person from engaging in an unfair labor practice extends only to an unfair labor practice "affecting commerce" (*Labor Board v. Denver Bldg. Council* (1951), 341 U.S. 675, 683). "Commerce" is defined in the Act as "interstate commerce" (Sec. 2 (6)), and the term "affecting commerce" is defined as "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce" (Sec. 2 (7).)

The activities of respondents in this case clearly were not "in interstate commerce". Therefore, the issue is whether the activities burdened or obstructed interstate commerce or the free flow of such commerce.

The threat of the respondent Union to order its members not to work with the charging party until the latter complied with the Union's rule affected only the work in which those members were then engaged. Such threat was not directed, either by express terms or by reasonable implication, at any other construction work on the Stonestown project or at any operations of respondent Reed other than

those at the place where the charging party was working. By reason of the limited and narrow nature of the dispute, none of these other operations was threatened with obstruction or diminution, and hence none of them should properly be taken into account in determining the potential effect of the dispute upon interstate commerce (*Groneman v. International Brotherhood of Elec. Workers* (10th C.A. 1949) 177 F. (2d) 995).

When consideration is limited to the work on which the charging party was engaged at the time the Union threatened to order its members from the job, there is no evidence whatever to support a finding that the execution of such threat would have burdened or obstructed interstate commerce. Such work consisted of the construction of flower boxes, chimneys and garages entirely with materials from sources within the State of California. There was no showing that any of the other construction work on the project was dependent upon the installation of these items, or that the flow of any material from out of the State to the project would have been stopped or obstructed by delay in the completion of such items.

The Board's assertion of jurisdiction in this case is premised entirely upon the assumed impact that a labor dispute affecting respondent Reed's total annual operations in 1948 and 1949 would have had upon interstate commerce. The Board ignores entirely the fact that its jurisdiction in unfair labor practice cases is not coextensive with the employer's total operations, but is limited by the wording of the statute to unfair

labor practices which in themselves affect interstate commerce (*Labor Board v. Jones & Laughlin* (1936), 301 U.S. 1, 31; *Denver Bldg. & Constr. Tr. C. v. National Labor Rel. Bd.* (App. D.C. 1950), 186 F. (2d) 326, 329-330, *rev'd* on another ground (1951), 341 U.S. 675). In such cases, the volume of the employer's total annual operations is pertinent only where the unfair labor practice is of a nature which can fairly be said to lead or tend to lead to a labor dispute which would burden or obstruct those total operations. As we have demonstrated, the alleged unfair labor practice here involved was limited in its potential impact upon interstate commerce to the specific work being performed by respondent Reed on the Stonetown tract.

The authorities cited by the Board in support of its position do not sustain its assertion of jurisdiction in this case.

In *Labor Board v. Denver Bldg. Council* (1951), 341 U.S. 675, *rev'g* (App. D.C. 1950), 186 F. (2d) 326, the unfair labor practice involved, namely, picketing of a construction project to compel the general contractor to cease doing business with an electrical subcontractor who employed nonunion men, was of such a nature that it threatened to stop the subcontractor's entire operations. The Court of Appeals, in sustaining the Board's assertion of jurisdiction as a "borderline" case, relied heavily upon this fact, saying (186 F. (2d) 330):

> "Such stoppages in the work of this concern [the electrical subcontractor] would in a prac-

> tical and economic sense adversely affect its total business, including its out-of-state purchases. While the actual goods involved at the two sites are not satisfactorily shown to have derived from interstate commerce, the threatened or actual stoppage of work on these and similar projects reasonably should be held to affect significantly the total business of the concern, a substantial part of which is interstate."

The Supreme Court merely upheld the conclusion of the Court of Appeals on this issue, citing the same commerce facts relied on by the lower Court.

In each of the other cases cited by the Board, namely, *Polish National Alliance v. N.L.R.B.* (1944), 322 U.S. 643; *N.L.R.B. v. Fainblatt* (1939), 306 U.S. 601; *N.L.R.B. v. Townsend* (9th C.A. 1950), 185 F. (2d) 378; *N.L.R.B. v. Fry Roofing Co.* (9th C.A. 1951), 193 F. (2d) 324, and *N.L.R.B. v. Holtville Ice & Cold Storage Co.* (9th C.C.A. 1945), 148 F. (2d) 168, the unfair labor practices involved were of such nature that they could reasonably be said to have led or had a tendency to lead to the stoppage of the employer's entire operations, or a portion of such operations directly involving the interstate shipment of goods.

In the *Polish National Alliance* case the Court pointed out that a stoppage or disruption of work resulting from an effective strike against the Alliance would involve "interruptions in the steady stream, into and out of Illinois, of bills, notices and policies, the payment of commissions, the making of loans on

policies, the insertion and circulation of advertising material in newspapers, and its dissemination over the radio'' (322 U.S. 645).

In the *Fainblatt* case, the Court, in sustaining the jurisdiction of the Board, referred specifically to the Board's finding that the employer's unfair labor practices had led to a strike in its tailoring establishment which cut its overall output by about 50 per cent (306 U.S. 608-609).

B. RESPONDENT REED'S CONDUCT WAS NOT AN UNFAIR LABOR PRACTICE WITHIN THE MEANING OF SECTIONS 8 (a) (1) AND 8 (a) (3) OF THE ACT, SINCE SUCH CONDUCT DID NOT HAVE THE PROXIMATE AND PREDICTABLE EFFECT OF ENCOURAGING OR DISCOURAGING MEMBERSHIP IN THE HOD CARRIERS UNION.

The Board in its brief has interpreted respondents' activities as an attempt to operate under closed shop conditions, and has cited numerous authorities to the effect that a closed shop is no longer permissible (pp. 10-13).

Clearly, however, there was no attempt in this case to enforce closed shop conditions. The charging party was already a member of the respondent Union, and therefore the threats of the business agent were not directed at preventing a non-member of the Union from securing or retaining employment.

The Union had adopted a rule which required that when a member moved to a new job, he report such fact to the Union and obtain a ''clearance''. The

charging party, as a long-time member of the Union, had participated in the adoption and maintenance of such rule. He had the power to comply with the rule, and the clearance was his for the asking. Until he complied with the rule, his fellow Union members would not work with him.

In this situation respondent Reed was powerless to protect the charging party. The bricklayers could not proceed for any length of time without the hod carriers (R. 80). The charging party could not do the work of the full crew of hod carriers, so that the practical choice presented to respondent Reed was either to lay the charging party off until he straightened out his difficulty with the Union or suspend his operations. Respondent chose the former course. In so doing he acted solely for the purpose of keeping his job going, and with no intent or purpose of discouraging or encouraging the charging party's membership in the Union (R. 159).

Obviously, since the charging party was a member of the respondent Union and had been a member for many years, respondent Reed's action did not encourage such Union membership. Neither did respondent's action encourage Union membership on the part of any of the other hod carriers on the job, since undisputed evidence established that all of these men were members of the Hod Carriers Union and had been such for years (R. 81).

By reason of this undisputed evidence, the Board is relegated to the argument that respondent violated Sections 8 (a)(1) and 8 (a)(3) because its action en-

couraged the charging party and the other hod carriers on the job to comply with the rules established by their own Union. Such an argument, we submit, gives a strained and unnatural meaning to the words of the statute.

Section 8(a)(3) forbids an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage *membership in any labor organization"*.* It permits an employer to enter into a union-shop agreement with a labor union under specified circumstances, but it stipulates that notwithstanding such permission "no employer shall justify any discrimination against an employee for *non-membership in a labor organization* * * * (B) if he has reasonable grounds for believing that *such membership was denied or terminated* for reasons other than the failure of the employee" to tender dues and initiation fees.

The Board asks this Court to ignore the plain language of the Section, and to construe its provisions as a general and all-embracing prohibition against any act by an employer which would encourage his employees to comply with any rule of their own Union, other than the rule requiring payment of dues and initiation fees.

This request has already been rejected by the Court of Appeals for the Eighth Circuit, and we respectfully submit that it should be rejected by this Court.

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*Throughout this brief, emphasis is ours unless otherwise noted.

In *National Labor Relations Board v. Del E. Webb Const. Co.* (8th C.A. 1952), 196 F. (2d) 702, the Board found the respondent employer guilty of a violation of Sections 8(a)(3) and 8(a)(1) of the Act because it had yielded to a demand of the Operating Engineers Union that it lay off a member of the apprentice unit of the Union to make a place for a journeyman member of the Union. A Union rule gave journeymen seniority rights over apprentices. The apprentice could not become a journeyman member of the Union because he could not meet the eligibility requirements of the Union.

The Court of Appeals denied the Board's petition for enforcement of its order, saying (pp. 705-706):

> "Pickard could scarcely have been encouraged to become a journeyman member of respondent union because under no circumstances could he become such member. His status so far as union affiliations were concerned, was fixed and could not be changed at least by any act of the respondent company. It can scarcely be said that one may effectively be encouraged to do or not to do that which he is incapable of doing.
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> * * * * * * *
>
> "So in the instant case, it being impossible for Pickard to become a member of the respondent union, nothing that respondent company might do by way of discriminating against him could be said proximately to encourage him to join a union which was impossible for him to join. *There can be no violation of this statute unless the conduct complained of can have the proximate and predictable effect of encouraging or discouraging*

membership in a labor organization. N.L.R.B. v. Winona Textile Mills, 8 Cir., 160 F. 2d 201; N.L.R.B. v. Potlatch Forests, 9 Cir., 189 F. 2d 82; Western Cartridge Co. v. N.L.R.B., 7 Cir., 139 F. 2d 855.

"In this view of the law it is not, we think, as we have already observed, material whether Local 101 and Local 101-B are the same or different unions. Members of respondent union are skilled craftsmen. There is provision for an orderly promotion from the apprenticeship stage to the journeyman status, after which a member may properly be regarded as a master craftsman. Nothing in the National Labor Relations Act prevented a union from adopting rules of its own as to distribution of work among its members. *No one is required to join the union and subject himself to such rules and regulations; neither is there any inhibition against his withdrawing from the union if such rules and regulations are not satisfactory to him.*

"We conclude that the termination of Pickard's employment did not reasonably tend to encourage membership in respondent union or to discourage membership in Local 101-B within the purview of the National Labor Relations Act. The petition to enforce the cease and desist order of the National Labor Relations Board is therefore denied."

In this case, as in the *Webb Construction Company* case, respondent's conduct could not possibly have encouraged membership in the Union. In the *Webb Construction Company* case the reason was that the charging party was not eligible for membership in

the journeyman branch of the Union. In this case the reason is that the charging party was already a member of the Union, and evidenced no desire or inclination to withdraw from the Union, notwithstanding its clearance rule. As the Court of Appeals for the Eighth Circuit pointed out in another case involving the Webb Construction Company, *Del E. Webb Const. Co. v. National Labor Relations Board* (8th C.A. 1952), 196 F. (2d) 841, at page 848:

> "it is difficult to see how the Company's action may be said 'to encourage * * * membership in any labor organization', as charged by the Board, and which must be found if there is to be a Section 8(a)(3) violation. The men were already members of the Union, and in the absence of a showing that only union men were to be hired (a fact not proved herein as shown in the discussion of Point 1), *it is difficult to see how the men would be encouraged to retain membership (which might be held to be a phase of 'encouraging membership') in the Union, which must have seemed to them to be keeping them from employment.*"

If this Court were to adopt the construction of the Act urged by the Board, it would extend beyond any fair limit the principle that an employer must endure the destruction of his business, rather than participate in an unfair labor practice (*National Labor Relations Board v. Lloyd B. Fry Roofing Co.* (9th C.A. 1951), 193 F. (2d) 324, 327). An employee who has been denied or deprived of membership in a union for reasons other than failure to meet reasonable

financial obligations is helpless to protect himself against discriminatory action by the union. Therefore, it is reasonable to require that the employer protect such employee's right to work against the demands of the union. Where the employee is a member of the union, however, it is within his power to protect himself, by compliance with the union's rules, against the refusal of his fellow members to work with him. The Act does not expressly say that in such situation the employer must suffer loss to protect the employee against the consequences of the latter's nonconformance, and there is no compelling reason to be found, either in the letter or the policy of the statute, why such a requirement should be read into the Act by this Court.

C. THE ORDER IS ARBITRARY, CAPRICIOUS AND CONTRARY TO LAW FOR THE REASON THAT IT WAS ISSUED AT A TIME WHEN EMPLOYERS (SUCH AS RESPONDENT REED) AND UNIONS IN THE BUILDING AND CONSTRUCTION INDUSTRY WERE BEING EFFECTIVELY DENIED THE BENEFIT OF THE ELECTION PROVISIONS OF THE NATIONAL LABOR RELATIONS ACT. THE ENFORCEMENT OF THE UNFAIR LABOR PRACTICE PROVISIONS OF THE ACT IN SUCH CIRCUMSTANCES IS CONTRARY TO THE INTENT OF CONGRESS, AND A DENIAL OF DUE PROCESS OF LAW IN CONTRAVENTION OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Under the National Labor Relations Act, the Board is charged with two principal functions. One is "the certification, after appropriate investigation and hearing, of the name or names of representatives, for collective bargaining, of an appropriate unit of em-

ployees" (*A. F. of L. v. Labor Board* (1940), 308 U.S. 401, 405). The other is "the prevention by the board's order after hearing and by a further appropriate proceeding in Court, of the unfair labor practices enumerated in Section 8" (*A. F. of L. v. Labor Board, supra).*

In *The Plumbing Contractors Association of Baltimore, Maryland, Inc.* (1951), 93 N.L.R.B. 1081, the Board held, with respect to the building and construction industry, that Congress did not intend that it should perform the second of these functions, namely, the prevention of unfair labor practices, while it was neglecting to perform the first of these functions. It said (pp. 1085-1086):

> "As the Board has pointed out in earlier cases involving the building and construction industry, the legislative history of the amended Act clearly establishes the intent of Congress in 1947 that the Board should assert jurisdiction in that industry for the purpose of preventing certain unfair labor practices by labor organizations. Consistent with that intent, the Board has asserted jurisdiction in unfair labor practice cases arising under Section 8 (b) (4) of the Act, when such assertion was appropriate on the basis of the commerce facts established therein. In addition, however, to proscribing certain conduct by labor organizations, Section 8 (b) (4) excepts from such proscription, or grants certain benefits to, a labor organization which has been *certified* pursuant to Section 9(c). Section 8(b) (2), when read in conjunction with Section 8(a)(3), grants to a labor organization which has been *certified* pur-

suant to Section 9(e)(1) the right to enter into and enforce a union-security contract. **If, as we think it must, the Board is to continue in appropriate cases to process complaints and issue cease and desist orders against labor organizations in the building industry, it would be most inequitable for the Board, at the same time, to deny to labor organizations the benefits which accrue from certification when, in appropriate cases, our jurisdiction is invoked. We do not believe that Congress intended that in this industry the Board would wield the sword given it by the Act, but that labor organizations desiring it should be denied the shield of the Act.** We believe, rather, that in providing that certain benefits would flow from certification, Congress intended that the shield should go with the sword, and that the Board should to this end assert jurisdiction in representation and union-security authorization cases to the same extent and on the same basis as in unfair labor practice cases. **Unless and until Congress, for reasons of policy, provides otherwise by appropriate legislation, we must proceed on that basis. We could not take any other course without flouting the will of Congress as now expressed in the 1947 statute.''**

The decision in the *Baltimore Plumbers* case, quoted *supra,* was announced more than three and one-half years after the effective date of the Labor Management Relations Act and almost three years after the Board's decision in *Ozark Dam Constructors,* June 16, 1948, 77 N.L.R.B. 1136, when the Board first announced its departure from its former policy of not asserting jurisdiction over the building and construc-

tion industry. Notwithstanding the *Baltimore Plumbers* decision, the Board has not yet devised workable election procedures applicable to the great bulk of the employers and unions in the industry. Nevertheless, the Board continues to process and press unfair labor practice charges against such employers and unions.

It may be conceded that the Board was not required to apply the election provisions and the unfair labor practice provisions of the Act to the building and construction industry simultaneously. In view of the complexities involved in setting up workable election procedures, a degree of "administrative lag" is excusable. But, as experience has demonstrated in this very industry, any appreciable lag between the application to an industry of the unfair labor practice provisions of the Act and the application of the election provisions thereof disrupts rather than stabilizes labor-management relations in the industry. See Senate Report No. 1509, May 5, 1952, on S. 1973, 82d Cong. 2d Sess.*

In the administration of the National Labor Relations Act, specifically including the unfair labor practice provisions of the Act, the Board acts under a

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*In this report, which was with respect to proposed amendments to the Labor Management Relations Act relating specifically to the building and construction industry, the Senate Committee on Labor and Public Welfare reported as follows:

> "These amendments are intended to remedy the hardships and disruption of labor relations which have resulted from the proven impracticability of accommodating the normal doctrines and election procedures of the National Labor Relations Act to the building and construction industry."

broad delegation by Congress of authority to effectuate the policies of the Act (Act, Sec. 10(c); *Labor Board v. Fansteel Corp.* (1939), 306 U.S. 240, 257; *Southern S. S. Co. v. Labor Board* (1942), 316 U.S. 31, 47; *Pittsburgh Glass Co. v. Board* (1941), 313 U.S. 146, 165). The basic policy and primary objective of the Act is to stabilize labor-management relations (*Colgate-Palmolive-Peet Co. v. National Labor Relations Board* (1949), 338 U.S. 335, 362). Therefore, where it is demonstrated that a decision and order of the Board under the Act disrupts rather than stabilizes such relations in an industry, remedial amendment of the Act by Congress is not required, but the Courts have full power to deny enforcement of the decision and order of the Board on the ground that it is in excess of the Board's delegated authority (*Labor Board v. Fansteel Corp.* and other authorities cited *supra; National Labor Relations Board v. Flotill Products* (9th C.A. 1950), 180 F. (2d) 441, 444).

Further, if the Act were to be construed as giving the Board discretion to withhold the "shield" from the building and construction industry while wielding the "sword" therein, such a construction would render the Act void as violative of due process of law. There could be no reasonable justification for such a discriminatory treatment of a single industry. The Act was enacted for the purpose of protecting and preserving the important contract rights flowing from collective bargaining (*Edison Co. v. Labor Board* (1938), 305 U.S. 197, 238). Management and labor in the building and construction industry are as much

entitled to the protection of such rights as management and labor in other industries, and the application of the Act to them in such a way as to emasculate these rights without providing any means for protecting and preserving them would constitute discrimination "gross enough * * * as equivalent to confiscation and therefore void under the Fifth Amendment" (see *Hamilton Nat. Bank v. District of Columbia* (App D.C. 1946), 156 F. (2d) 843, 846 (1949), 176 F. (2d) 624, *cert. den.,* 338 U.S. 891).

D. IN THE EVENT ENFORCEMENT OF THE BOARD'S ORDER IS DIRECTED, RESPONDENT REED'S LIABILITY FOR BACK PAY SHOULD BE LIMITED TO THE LOSS OF PAY ATTRIBUTABLE TO HIS CONDUCT; NAMELY, SUCH LOSS OF PAY AS THE CHARGING PARTY MAY HAVE SUFFERED BETWEEN JUNE 14, 1949, THE DATE OF HIS LAYOFF, AND JUNE 24, 1949, THE DATE ON WHICH THE CHARGING PARTY, IN THE NORMAL COURSE OF EVENTS WOULD HAVE RETURNED TO THE EMPLOY OF HIS REGULAR EMPLOYER.

The Trial Examiner recommended (R. 40), and the Board ordered (R. 58-60), that respondent Reed and the respondent Union, jointly and severally, pay the charging party a sum of money equal to that which he would normally have earned as wages from the date of his discharge (layoff) to the date of an offer of reinstatement from respondent Reed.

Insofar as respondent Reed is concerned, this order, if enforced, would require him to reimburse the charging party for substantially more than the charging party lost as the result of any conduct on respondent

Reed's part. In accordance with past practice, respondent Reed had borrowed a crew of three men, including the charging party, from another masonry contractor upon the understanding that the men could be recalled by the latter at any time. The two men who were thus borrowed and continued in respondent's employ after the date of the charging party's layoff were recalled by their regular employer on June 24, 1949. At that time the regular employer needed hod carriers and would have employed the charging party if he had applied for work, but the charging party did not seek employment from him.

In view of these circumstances, the award of back pay against respondent Reed for any period after June 24, 1949, is punitive, rather than remedial, and is not authorized by the Act (*Republic Steel Corp. v. Labor Board* (1940), 311 U.S. 7, 11; *Phelps Dodge Corp. v. Labor Board* (1941), 313 U.S. 177, 199; *National Labor Relations Board v. Wilson Line* (3rd C.C.A. 1941), 122 F. (2d) 809, 813; *National Labor Relations Board v. Planters Mfg. Co.* (4th C.C.A. 1939), 106 F. (2d) 524).

IV. CONCLUSION.

For the foregoing reasons, we respectfully submit that this Court should set aside the Board's order in this proceeding. In the alternative, we submit that if enforcement is directed, the Court should modify the order to provide that the direction concerning the payment of back pay be limited, insofar

as respondent Reed is concerned, to the period from June 14, 1949 to June 24, 1949.

Dated, San Francisco, California,
October 27, 1952.

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